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In the Supreme Court of the United States

IN RE ADOPTION OF G.V.

JASON AND CHRISTY VAUGHN,
Petitioners,

v.

BENJAMIN J. WYREMBEK,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITIONERS' REPLY BRIEF

MICHAEL R. VOORHEES
VOORHEES & LEVY LLC
11159 KENWOOD ROAD
CINCINNATI, OHIO 45242
(513) 489-2555 PHONE

C. THOMAS HECTUS
HECTUS & STRAUSE PLLC
804 STONE CREEK PARKWAY
SUITE ONE
LOUISVILLE, KENTUCKY 40223
(502) 426-1661 PHONE

L. LIN WOOD
Counsel of Record
AMY M. STEWART
BRYAN CAVE LLP
ONE ATLANTIC CENTER
FOURTEENTH FLOOR
1201 W. PEACHTREE STREET, NW
ATLANTA, GEORGIA 30309-3488
(404) 572-6600 PHONE
lin.wood@bryancave.com

Counsel for Petitioners

February 15, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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REPLY ARGUMENT IN SUPPORT OF GRANTING THE WRIT

Under the plain and unambiguous statutory regulations governing adoptions in Ohio, Petitioners filed an adoption petition to adopt a child who had lived with them since birth, whose mother had been abandoned months before his birth by the putative father, and whose legal parents consented to the adoption. If the courts of Ohio had followed the statutory guidelines, enacted "to prevent children from being forcibly removed from their adoptive homes after a biological father belatedly exercised parental rights," this Petition would not be before the Supreme Court, Grayson's adoption would have been finalized years ago, and Grayson would not have been subjected to the unimaginable psychological harm of being ripped from the only family he ever knew and placed with a complete stranger whose only tie to him is his DNA. *Adoption of G.V.*, 126 Ohio St.3d at 258 (Cupp, J., dissenting) (citing 64 Ohio Report No. 198, Gongwer News Service, Inc (October 17, 1995) 1). Instead, the Probate Court, the Sixth District Court of Appeals, and the Ohio Supreme Court ignored the statutory regulations, the legislative intent in creating the putative father registry, and the constitutional rights of Petitioners and Grayson in dismissing a timely and appropriate adoption petition without notice, a hearing, or even a consideration of the best interests of the child. This Court should grant the Petition for Writ of Certiorari to address the due process issues raised by the Ohio Supreme Court's decision, and the incorrect interpretation of U.S. Supreme Court jurisprudence upon which the Ohio Supreme Court relied to violate constitutional due process rights.

I. THE PETITIONERS' FEDERAL QUESTIONS HAVE BEEN ADEQUATELY PRESERVED FOR REVIEW.

Respondent is woefully incorrect in arguing that Petitioners failed to preserve the first and second questions presented for review. All that is required to preserve a claim for review under 28 U.S.C. § 1257 is that a litigant "indicate the federal law basis for his claim in a state-court petition or brief ... by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Howell v. Mississippi*, 543 U.S. 440, 444 (2005) (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)). Petitioners more than met this burden – arguing at every stage of these proceedings that their federal rights and those of the minor child, Grayson, were violated when the Probate Court, in contravention of Ohio statutory law, bestowed constitutionally protected parental rights upon Respondent, ignored the rights of Petitioners and Grayson, and dismissed the adoption petition without notice or opportunity for a hearing.

In the ruling at issue, the Probate Court held:

> Section 3107.07(B) no longer applies to Mr. Wyrembek although he was a putative father when the petition was filed.... The judicial determination of a parentage action ... changes his status in this matter and he is now a legal father and falls under the provisions of R.C. 3107.07(A).... Since one year had not expired prior to the placement of the child or the filing of the petition and one year has not expired

> since the paternity finding, it is impossible to show that Mr. Wyrembek's consent is not required pursuant to Section 3107.07(A). Accordingly, the Court finds the Petition for Adoption has been filed prematurely and therefore it is hereby dismissed.

Appx. at 52a. In appealing this ruling, Petitioners specifically argued in their fourth enumeration of error that the "due process rights of Appellants were violated" when the Probate Court changed Respondent's status from putative father to legal father after the petition for adoption was filed and dismissed the adoption petition without notice or opportunity for a hearing. Appx. at 81a (citing *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)). The Sixth Appellate District Court of Lucas County specifically addressed this Argument, affirming the dismissal by the Probate Court. Appx. at 28a.

Similarly, in appealing the decision of the Sixth Appellate District, Petitioners again raised the due process argument with the Ohio Supreme Court, alleging that Ohio's statutory scheme of a putative father registry as written adequately "protect[s] [Respondent's] due process rights"; that "children are persons with rights protected by the United States Constitution"; and that the lower courts "elevated the rights of the birth-father above the rights of all other parties in the adoption proceeding" by dismissing the adoption petition without consideration of the rights of

the other parties or best interests of the child.[1] Appx. at 94z-100a (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr*, 463 U.S. 248 (1983); *Michael H.*, 491 U.S. 110 (1989); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *In re Gault*, 387 U.S. 1, 13 (1967)).

In affirming the decision of the Sixth Appellate District and the Probate Court, the Ohio Supreme Court specifically relied on the following U.S. Supreme Court precedent: *Santosky v. Kramer*, 455 U.S. 745 (1982) (Rehnquist, J., dissenting); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (Brennan, J., dissenting); and *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996). In reliance on these opinions, the Ohio Supreme Court determined that the constitutional rights of a biological father should be superior to those of either his own biological child, or prospective adoptive parents who have raised that child since birth, and that neither prospective adoptive parents nor minor children have any constitutional rights regarding the determination of their family units.

In response to the Ohio Supreme Court's decision, Petitioners filed a motion for reconsideration based in

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[1] Petitioners also argued that the substantive and procedural due process rights of all other parties to the adoption, including Petitioners and the minor child, were violated by the lower courts in Petitioners' Memorandum in Support of Jurisdiction before the Ohio Supreme Court. Memorandum, p. 12-14 (arguing that the Probate Court violated the due process rights of all parties to the adoption proceeding by dismissing the adoption without a consideration of all relevant issues).

part on the fact that "[t]he majority did not even address any constitutional issues, although Appellants have argued constitutional issues during this entire case, including in the Probate Court, in the Court of Appeals, and in this Supreme Court." Motion for Reconsideration ("Motion"), p. 17. The Ohio Supreme Court denied the motion without an opinion. Appx. at 30a.

Even if it could be argued that Petitioners' repeated presentation of constitutional arguments in the lower courts as outlined above was somehow insufficient, Petitioners motion for reconsideration more than adequately preserved the issues. While the Court "ordinarily do[es] not consider an issue first presented to a state court in a petition for rehearing if the state court did not address it[,] ... where the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review." *Stop The Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 130 S. Ct. 2592, 2600 n. 4 (2010) (internal citations omitted). In their motion for reconsideration, Petitioners specifically argued that the majority decision of the Ohio Supreme Court erred by "effectively destroy[ing] the balance of the rights of the parties in an adoption proceeding and violat[ing] the constitutional due process rights of all parties except the alleged unsuitable biological father." Motion at 3. Petitioners went on to argue, "The question is: how does this comport "with the requirements of due process and the plain meaning of its provisions" as this Court required in *Pushcar* at 110 Ohio St. 3d 334? The answer is that it does not." Motion at 5.

Petitioners went on to cite *Lehr*, 463 U.S. at 261, regarding the due process rights of biological fathers in relation to their children, and explained how the Ohio Supreme Court misapplied U.S. Supreme Court precedent in direct contradiction to *Lehr*, arguing as follows:

> The U.S. Supreme Court stated that "the mere existence of a biological link does not merit equivalent constitutional protection." *Lehr*, 463 U.S. at 261. Therefore, the majority is wrong to cite *Santosky v. Kramer* (1982), 455 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Lehr*, 463 U.S. at 260. It is disheartening for the majority to cite *M.L.B. v. S.L.J.* (1996), 519 U.S. 102, 136 L.Ed.2d, 473, 117 S.Ct. 555, and discuss "family association" and "long-term impact on all the concerned parties" as if such comments somehow support Appellee's position. Appellee has no relationship, other than biological, with this child. This child has been with the Appellants his entire life. Appellants and this child have a real parent-child relationship. This child has bonded familial relationships with the Appellants, with Appellants' other children, and with Appellants' parents and other family members. If this Court is going to base[] its decision on important family association, it must consider the child's bonded relationships. This Court should ask: why did the birth-mother place this child and why does she continue[] to support the adoption? The answers to these questions would have been before this

> Court if the law had been followed by allowing the Appellants to have their day in court and present the evidence on the allegations made under the applicable statutes of R.C. 3107.07(B)(2)(b) and R.C. 3107.07(B)(2)(c). If the majority's opinion becomes the decision of this Court, Appellants and the child will be precluded from having their day in court and the alleged misdeeds of Appellee will not be addressed. Appellee was a putative father when the adoption petition was filed. Appellee's only connection to the child is that he was later determined to be the biological father....
>
> Permanency for this child is at issue and, if this Court will just acknowledge the constitutional due process rights of the parties to have this case heard, the issue will be addressed in the adoption proceeding.

Motion at 14-17.

Petitioners more than adequately "indicate[d] the federal law basis" for their claims in their motion for reconsideration, "citing in conjunction with the claim the federal source of law" on which they relied and "case[s] deciding such a claim on federal grounds." *Howell*, 543 U.S. at 444 (quoting *Baldwin,* 541 U.S. at 32). There can be no argument as to whether Petitioners raised "federal" claims during this litigation. Petitioners have consistently argued that their constitutional rights and those of Grayson have been violated by the Ohio courts, have consistently cited federal case law in support, and detailed these arguments in their motion for reconsideration which was denied by the Ohio Supreme Court. Petitioners

have preserved the first and second questions presented for review.[2]

II. PETITIONERS HANDS ARE "CLEAN" AND SHOULD NOT BE DENIED AN OPPORTUNITY TO HAVE THEIR CONSTITUTIONAL RIGHTS ADDRESSED.

Respondent argues that Petitioners do not have "clean hands" in this matter and as a result neither Petitioners nor Grayson, who Respondent conveniently refers to as a "proposed adoptee," are entitled to a determination of their constitutional rights. Response, p. 13. Such an argument ignores the actual history of this litigation. The facts in this matter show that after the birth-mother became pregnant with Respondent's child and informed him of this fact, he abandoned her, cutting off all contact. Not wanting to raise Grayson as a single parent (due to her divorce from Grayson's legal father), the birth-mother hand-selected Petitioners to be the adoptive parents of her unborn child. Grayson's legal parents surrendered custody of Grayson to Adoption by Gentle Care on November 4, 2007. ICPC approval from both Ohio and Indiana was obtained on November 7, 2007. It was not until November 20, 2007 – after Respondent learned of

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[2] To the extent this Court finds Petitioners to have not adequately preserved these issues, however, Petitioners ask this Court to decide the matter nonetheless. The Court "may make exceptions to [the] general approach to claims not raised below." *Polar Tankers, Inc. v. City of Valdez, Alaska*, 129 S.Ct. 2277, 2286 (2009). Such an exception is warranted here because "deciding the matter now will reduce the likelihood of further litigation" regarding the constitutional rights at issue in adoption and family custody cases. *Id.*

Grayson's pending adoption – that he belatedly sought to assert any parental rights at all by registering with the putative father registry. Since Respondent did not register with the putative father registry until after ICPC approval was obtained, Respondent's arguments that the ICPC placement was somehow "not legal" is baseless. *See, e.g.*, Response at 10.

Unlike the complete abandonment of the birth mother and biological child by Respondent, Petitioners were present in the delivery room when Grayson was born and took Grayson home from the hospital in accordance with the ICPC approval. At no point prior to Grayson being placed with Petitioners did Respondent attempt to care for or support the birth-mother or seek to establish a parental relationship with his newborn child.

Per the laws governing the putative father registry and adoptions in Ohio, consistent with putative father registries which have been approved by this Court and now exist in over thirty states, Respondent's consent to the adoption was not required because he was a putative father who had "willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor." Ohio Rev. Code Ann. § 3107.07(B)(2). Petitioners at all times followed the laws of Ohio, and per those laws, should have had the opportunity to finalize the adoption within months of Grayson's birth. Instead, Petitioners were forced to litigate their ability to even file their adoption petition for years, with the Ohio Supreme Court ultimately dismissing the adoption petition and denying Petitioners and Grayson any constitutional rights.

"The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Lehr*, 463 U.S. at 262. Putative fathers who make no effort to "grasp[] that opportunity and accept[] some measure of responsibility for the child's future," do not have the constitutional right to demand a voice in determining the best placement for that child. *Id.* Respondent is just such a putative father: he abandoned the birth-mother and ignored his biological child until he discovered the child had been placed for adoption. As this Court has noted,

> A parent's rights with respect to h[is] child have ... never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae,* and, critically, the child's own complementary interest in preserving relationships that serve h[is] welfare and protection.

Troxel v. Granville, 530 U.S. 57, 88 (2000) (internal citations omitted). Per the law of Ohio, Petitioners had a valid adoption petition, and should have the opportunity to seek permanent legal custody of Grayson. Instead, Petitioners' constitutional rights were ignored, Respondent was given constitutional

rights that were not his, and the adoption petition was dismissed without even a passing glance at the best interests of the child.

Petitioners have not engaged in frivolous litigation concerning a child they had no right to adopt. It is Respondent, not Petitioners, who engaged in this behavior, obtaining dismissal of a valid adoption petition over two years after it was filed and obtaining custody of Grayson in violation of the statutory law of Ohio and the constitutional rights of everyone else involved. It is Respondent, not Petitioners, who has unclean hands in this matter, fighting to have a child removed from the only home he has ever known – a child he had no interest in having a relationship with as long as he was raised by his biological mother – all for the sake of preventing his DNA from being adopted.

CONCLUSION

The Ohio Supreme Court misinterpreted U.S. Supreme Court precedent, ignored Petitioners' constitutional rights, and most importantly ignored Grayson's constitutional rights in dismissing the adoption petition. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976). "[T]o the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so too, do children have these interests, and so, too, must their interests be balanced in the

equation." *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting). Despite Respondent's protestations to the contrary, and the Ohio Supreme Court's incorrect decision, "children are not merely chattels belonging to their parents." *In re Bridget R.*, 41 Cal. App. 4th 1483, 1504 (1996). Grayson was entitled to have notice, a hearing, and his best interests considered prior to being removed from a valid adoptive placement, ripped from the only family he has ever known, and delivered into the hands of a stranger. It is time this Court decide whether children, and their prospective adoptive parents, have a constitutional right in preserving the sanctity of their family. Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully Submitted,

L. Lin Wood
Counsel of Record
Amy M. Stewart
BRYAN CAVE LLP
One Atlantic Center, Fourteenth Floor
1201 W. Peachtree Street, NW
Atlanta, GA 30309-3488
(404) 572-6600
lin.wood@bryancave.com

Michael R. Voorhees
VOORHEES & LEVY LLC
11159 Kenwood Road
Cincinnati, Ohio 45242
(513) 489-2555

C. Thomas Hectus
HECTUS & STRAUSE PLLC
804 Stone Creek Parkway, Suite One
Louisville, Kentucky 40223
(502) 426-1661

Counsel for Petitioners